

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION
Before the Commissioner of Financial and Insurance Regulation

In the matter of

XXXXX

Petitioner

File No. 92710-001

v

Health Alliance Plan of Michigan HMO
Respondent

Issued and entered
this 14th day of October 2008
by Ken Ross
Commissioner

ORDER

I
PROCEDURAL BACKGROUND

On August 19, 2008, XXXXX, on behalf of his minor son XXXXX (Petitioner), filed a request for external review with the Commissioner of the Office of Financial and Insurance Regulation under the Patient's Right to Independent Review Act, MCL 550.1901 *et seq.* On August 25, 2008, after a preliminary review of the material submitted, the Commissioner accepted the request.

Since the issue in this matter is medical in nature, the Commissioner assigned the case to an independent review organization (IRO) for analysis and a recommendation. The IRO submitted its report on September 8, 2008.

II
FACTUAL BACKGROUND

The Petitioner, born May 26, 2005, is a member of Health Alliance Plan (HAP), a health maintenance organization (HMO). In May 2007 he was diagnosed with autism spectrum

disorder (ASD). His father was advised that early intervention was necessary and that applied behavior analysis (ABA) was the best choice for effective treatment for children with autism. The Petitioner's primary care physician referred him to XXXXX program at XXXXX Hospital (XXXXX), a non-affiliated provider.

The Petitioner was evaluated at the XXXXX and on February 25, 2008, enrolled in the XXXXX program and received ABA therapy until May 22, 2008. The Petitioner's father requested authorization and coverage for the XXXXX program and follow-up treatment (monthly 2-hour sessions) at XXXXX. HAP denied coverage for the XXXXX ABA program but approved coverage for the follow-up care. The Petitioner appealed the decision.

The Petitioner exhausted HAP's internal grievance process and received its final adverse determination letter dated July 25, 2008.

III ISSUE

Did HAP properly deny the Petitioner's request for coverage of ABA therapy under the terms of its contract?

IV ANALYSIS

PETITIONER'S ARGUMENT

In January 2007, the Petitioner's primary care physician, XXXXX, MD, recommended and requested approval for intensive treatment using applied behavior analysis (ABA) at XXXXX. Dr. XXXXX said in an undated letter to HAP:

Intensive ABA provided by psychologists specializing in this field was prescribed as the "gold standard treatment" for children with autism in a recent issue of *Pediatric Annals*, the most widely read journal for continuing education, with an editorial board composed of the leading pediatricians in the United States. To be effective, ABA must be time-intensive. The New York State Department of Health describes time intensive as "approximately 20 hrs per week of individualized behavioral intervention using applied behavioral analysis techniques." The National Academy of Sciences Committee mandates "at least 24 hours per week."

To obtain this medically necessary intensive ABA treatment, I have referred [the Petitioner] and his family to XXXXX's XXXXX Center. This program, offered by the hospital's division of Development-Behavioral Pediatrics, provides intensive ABA and includes a heavy emphasis on parent training. Moreover, I understand it is provided by psychologists specializing in the field of ABA who are certified by the Behavior Analysis Certification Board....

I understand that the clinicians providing this treatment through XXXXX's XXXXX Center may not be paneled by the...family's insurance. In that event, please assist the family in obtaining this medically necessary treatment from an appropriate psychologist listed by the Board...who can provide this type of service and is located within a reasonable distance from the [Petitioner's] home.

The Petitioner's parents sought help from the XXXXX School District but say that his diagnosis, auditory-linguistic processing disorder, is neurologically based and therefore outside the scope of the school's responsibility. The district told the Petitioner's parents:

Your child...is enrolled in the XXXXX program, which is an Early On special education program. Our services are delivered in the home environment by an early childhood special education teacher. We also provide consultative services in the areas of speech and occupational therapy. These therapies are not direct services, but a consultation with the teacher and/or parents to share information on appropriate home program activities. If a child is in need of direct therapeutic services, parents are advised to pursue these services privately.

The Petitioner's father says that the Petitioner has made great strides with the XXXXX program. His communication, daily living, socialization, and motor skills have markedly improved and frequent tantrums have been eliminated. The Petitioner has learned to follow instruction and to communicate his needs. He no longer runs out into the street, climbs on the hot stove, or goes into deep water without an adult.

The Petitioner's parents argue that the ABA therapy was necessary and that there were no HAP affiliated providers capable of providing the services. They believe HAP is not aware of the benefits of ABA and should be making appropriate providers available to children like their son who have special needs.

The Petitioner's parents believe HAP should cover the services from the XXXXX Center

and XXXXX.

HAP'S ARGUMENT

In its final adverse determination letter of July 25, 2008, HAP denied coverage for the ABA therapy, stating in part:

You are requesting HAP to cover, authorize and reimburse you for the applied Behavior Analysis (ABA) treatment [the Petitioner] received from February 25, 2008 through May 22, 2008 at XXXXX Hospital. In addition, you are also requesting for HAP to cover and authorize follow up treatment that is once monthly two (2) hour sessions at XXXXX Hospital for a length of one (1) year, both are not benefits of your HAP HMO subscriber contract.

After careful consideration of your presentation and medical records, a decision was made to uphold the denial for the ABA treatment at XXXXX Hospital. However, HAP will approve the once monthly two (2) hour follow up sessions at XXXXX Hospital starting May 23, 2008 through December 31, 2008. After this date, HAP will require a progress report from the provider for future consideration of coverage for the monthly two (2) hour follow up sessions at XXXXX Hospital....

In its initial denial of the request for ABA therapy dated March 17, 2008, HAP said:

Services that are educational in nature are not a covered benefit according to your Health Alliance Plan Subscriber Contract. For specific information about covered benefits please refer to your HAP Subscriber Contract, Exclusions & Limitations, Section 5.1, Article P7 [sic]. Psychiatric assessment is available to your son with a HAP-contracted provider.

In response to the Petitioner's request for this external review, HAP wrote to the Office of Financial and Insurance Regulation on August 20, 2008:

Please note Section 5.1 (q) [sic; should be "p"] (4) for the HAP HMO subscriber contract, which indicates HAP does not cover therapy services related to cognitive training and/or retraining. [Italics and bold in original]

HAP believes its denial was appropriate.

COMMISSIONER'S REVIEW

The HAP subscriber contract, in Section 4.16, covers certain therapy and rehabilitation services, including physical, speech, and occupational therapy. HAP has identified as the basis

for its denial a provision in the Petitioner's subscriber contract (the document that defines his health care benefits) that excludes coverage for therapy or rehabilitation services that are cognitive training.¹ That provision says:

SECTION 5 – EXCLUSIONS AND LIMITATIONS

The following are not covered under this Contract:

* * *

5.1 Non-Covered Services

* * *

(p) Therapy and Rehabilitation Services

* * *

- (4) Services related to cognitive training and/or retraining.

The issue then is whether the Petitioner's ABA therapy is "cognitive training or retraining." To answer that question, the Commissioner assigned the matter to an independent review organization (IRO). The IRO expert is a practicing physician, board certified in pediatric neurology, and familiar with the medical management of patients with the Petitioner's condition. The IRO expert concluded that the XXXXX program treatment was not cognitive training or retraining. The IRO report said:

The results of the MAXIMUS physician consultant review indicate that this case involves a 3 year-old male with a history of pervasive developmental disorder who has been treated with applied behavioral analysis. At issue in this appeal is whether the treatment services that the [Petitioner] received from 2/25/08 to 5/22/08 were cognitive training or retraining.

The MAXIMUS physician consultant explained that applied behavioral analysis is an intensive behavioral therapy, which is psycho-educational in nature. [Citation omitted] The MAXIMUS physician consultant also explained that applied behavioral analysis involves a teaching strategy for the treatment of children with autism spectrum disorders. The MAXIMUS physician consultant indicated that applied behavioral analysis is not a medical treatment. The MAXIMUS physician consultant also indicated that applied behavioral analysis does not involve cognitive training or retraining.

Pursuant to the information set forth above and available documentation, the MAXIMUS physician consultant determined that the treatment services at issue in this appeal were not cognitive training or retraining.

¹ HAP has not argued that the Petitioner's services were not covered because they were provided by an out-of-network provider or for any other reason.

The IRO expert's recommendation, based on extensive expertise and professional judgment, is afforded deference by the Commissioner. The Commissioner can discern no reason why the IRO expert's judgment should be rejected in the present case. Therefore, the Commissioner accepts the IRO expert's conclusion that the ABA therapy was not cognitive training or retraining and therefore not excluded under the terms and conditions of the Petitioner's coverage.²

V ORDER

The Commissioner reverses HAP's July 25, 2008, final adverse determination in this matter. HAP shall authorize and cover the Petitioner's ABA therapy subject to any applicable conditions in Section 4.16 of the subscriber contract. HAP shall provide coverage within 60 days and shall, within seven days of providing coverage, present the Commissioner with proof it has implemented the Commissioner's Order.

To enforce this Order, the Petitioner must report any complaint regarding the implementation of this Order to the Office of Financial and Insurance Regulation, Health Plans Division, toll free 877-999-6442.

This is a final decision of an administrative agency. Under MCL 550.1915, any person aggrieved by this Order may seek judicial review no later than sixty days from the date of this Order in the circuit court for the county where the covered person resides or in the circuit court of Ingham County. A copy of the petition for judicial review should be sent to the Commissioner of the Office of Financial and Insurance Services, Health Plans Division, Post Office Box 30220, Lansing, MI 48909-7720.

² The Commissioner is constrained to comment on HAP's handling of the Petitioner's request for coverage. After reviewing the documents submitted by the parties, the Commissioner observes that the Petitioner's request for the HOPE program services was sent on or about January 15, 2008, and was assigned referral #002593862. However, HAP did not respond until sometime in March. The Petitioner began coverage in February 2008 based on a referral from his PCP.